



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

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DECISION OF THE BOARD

Mailed and Filed: NOVEMBER 04, 2022

IN THE MATTER OF:

Appeal Board No. 604247

PRESENT: MARILYN P. O'MARA, MEMBER

The Department of Labor issued the initial determinations (including May 8, 2017, and February 21, 2018) holding , LLC, DBA SIGNATURE DESIGN & CONSTRUCTION (hereafter the "employer" or "Signature") liable for additional tax contributions in the revised amount of \$86,660.40 for the audit period 1st quarter 2012 through 1st quarter 2014 based, in part, on remuneration paid to misclassified independent contractors, both identified and unidentified, as statutory construction trade employees pursuant to the Construction Industry Fair Play Act, Labor Law article 25-B (§ 861 et seq.),

plus a 50% fraud penalty in the amount of \$43,330.20. The employer requested a hearing, contending, in part, that those included in the audit performed services as independent contractors, that the cash withdrawals were payments to a corporate officer, and that there was no fraudulent intent.

The Administrative Law Judge held hearings at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances on behalf of the employer and the Commissioner of Labor. By decision filed November 21, 2018 (), the Judge granted the application to reopen a prior case, and sustained, as modified, the determination holding that certain identified individuals were not employees, that the cash withdrawals not excluded were remuneration, and that the fraud penalty was properly imposed.

The employer appealed the Judge's decision to the Appeal Board, insofar as it was adverse to the employer. The Board considered the arguments contained in the written statement submitted on behalf of the employer.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: Since 2005, Signature has operated a construction business performing residential renovations (e.g., apartments and townhouses). Pursuant to a homeowner's request, Signature examined the home and provided "a proposal to renovate the entire apartment", including "bathrooms, kitchens, floors, windows," etc. Signature's workers typically performed trade work limited to carpentry, tiling, and framing. Signature generally engaged subcontractors for other "major trades", such as plumbing, electrical, HVAC, painting, and windows. Signature scheduled and set completion dates with requisite subcontractors to ensure that certain work is performed in sequential order. Signature responded to complaints from its customers regarding its subcontractors, either by confronting the subcontractor and/or by providing a discount to the customer.

Pursuant to an audit completed in 2011 for a prior audit period 1st quarter 2008 through 3rd quarter 2011, the Department of Labor assessed Signature with additional tax contributions due based on remuneration paid to identified construction trade workers and unidentified construction trade workers who received cash payments without any records.

In 2015, based on a complaint that Signature had paid an individual off-the-books, the Department commenced the instant audit for the period 1st quarter 2012 through 1st quarter 2014. Signature reported 16 workers in 2012, 19 workers in 2013, and 21 workers in first quarter 2014. These employees included categories such as the office manager, foreman, carpenter, tiler, and laborer. The Department's initial audit included an overall count of at least 39 misclassified individuals and assessed tax contributions due of at least \$108,269.04. Signature concedes paying one individual off-the-books because its third-party payroll company was unable to process payment to that worker; Signature provided no records of the wage payments and withholdings for this individual.

The audit also determined that Signature's managing member made numerous cash withdrawals from the business, totaling \$409,088 in 2012, totaling \$756,776 in 2013, and totaling \$172,417 in first quarter 2014. Most of the cash withdrawals ranged from about \$1,000 to \$8,000 each, which were made daily, every other day, or at least weekly. The Department, based on the excessive amounts and frequency, applied much of the cash withdrawals to remuneration.

Throughout the audit process, the Department requested Signature to provide evidence (e.g., invoices for vendors paid in cash) to substantiate its allegation that these cash withdrawals were made for various cash payments to vendors for a discount, to customers for a refund, to landlords for rent and damages related to workers' temporary housing, to individuals for car accident damages, and to the managing member for personal use. Based on additional evidence provided, the Department subsequently modified its findings on several occasions. For example, pursuant to a Field Report dated March 6, 2015, the Department excluded from the audit 31 entities because they were deemed corporations or had an unemployment registration number. Subsequently, the Department further excluded from the audit several more individuals and entities and various non-wage payments. The final audit report and initial determination held Signature liable in the revised amount of \$86,660.40, which included the downward modified overall count of 26 misclassified individuals. Also, the Department assessed the fraud penalty because Signature failed to maintain adequate records, keep records of cash wages, and report remuneration paid to misclassified workers, even though it knew or should have known to comply based on the prior audit.

On May 21, 2012, \$40,008 was fraudulently withdrawn from a TD Bank in Atlantic City by a bank employee impersonating Signature's member. This perpetrator was caught and criminally prosecuted, which is supported by a letter from the U.S. Department of Justice regarding the eventual release of the named inmate.

The New York State Department of State lists Safe Painting Company Corp. as a domestic business corporation filed March 2, 2012 and dissolved by proclamation on August 31, 2016. Safe Painting's president, Elias Flores, AKA Elias Rodriguez, submitted written bids and performed services limited to plastering and painting walls for Signature. Safe Painting communicated with Signature regarding the construction schedule, which was generally dictated by the clients' deadlines and by the nature of construction. The Department, finding no unemployment insurance registration number for Safe Painting, included in the audit the payments to Safe Painting.

Michael Angela, Ltd., DBA Michal Angela Contracting ("MAC"), is a domestic business corporation filed with the NYS Department of State on March 19, 2002. MAC was a general contractor owned and operated by Richard Paolino. MAC was engaged for only one "small project" for about \$30,000 that may have lasted for about "four to six weeks" to install a new floor and new cabinets, and to perform painting work. MAC selected, hired, fired, and directed its workers on

the project without Signature's involvement. MAC set the schedule and oversaw the work. The Department, finding no unemployment insurance registration number for MAC, included in the audit the payments to MAC.

Igor Levechuk, DBA Igor's Painting and Carpentry, subcontracted painting work from Signature, first as an individual business through December 5, 2013, and then as a domestic business corporation (IL&SON CORP.) filed December 6, 2013 with the New York State Department of State. Mr. Levechuk maintained his own professional license and business, and he carried his own workers compensation and general liability insurances. He handled his own marketing and advertising through the internet and by placing signage at its various job sites. He decided on the projects to submit written bids and obtained the requisite work permits. He performed most of the painting services himself, but occasionally utilized and paid other workers as needed, with no input from Signature. Mr. Levechuk set his own work schedule subject to the overall project deadline; he purchased its own materials and equipment; he was at risk of loss for going over budget; and he was not restricted from working for competitors. Mr. Levechuk had a Federal Employer Identification Number (FEIN), but the record does not demonstrate if he filed Federal Income taxes as an independent business or profession. The Department, finding no unemployment insurance registration number for Igor Levechuk, included in the audit the payments made to him.

Gennadiy Kaliberda operated a contracting business performing tile work. Since Signature "had more tiling work than we could handle", it "hired him". Mr. Kaliberda, may have conducted business under one or more assumed names, e.g., South Fork Tile or New York Tile. He submitted bids or proposals identifying the scope of work, labor cost, material cost, and 3% charge for workers' compensation and liability insurance coverage; and he further laid out a payment schedule in four installments (e.g., 30% initial, 30% first progress installment, 30% second progress installment, 10% upon completion). Mr. Kaliberda purchased all his own materials and equipment, was at risk for any loss, and was free to work for competitors. He set his own work schedule, and any deadlines were driven by project deadlines that were set by the customer and architects. The record does not demonstrate if Mr. Kaliberda had a FEIN, or if Mr. Kaliberda filed Federal Income taxes as an independent business or profession. The Department, finding no unemployment insurance registration number for Gennadiy Kaliberda, included in the audit the payments made to him.

OPINION: The evidence establishes that Signature engaged construction trade

workers in the operation of its contracting business during the audit period 1st quarter 2012 through 1st quarter 2014. On appeal, along with the fraud penalty and the applied cash withdrawals to unidentified employees, Signature contests the finding of statutory employment relationships regarding four contractors, namely, Safe Painting Company Corp., Michael Angela, Ltd., Igor Levechuk, and Gennadiy Kaliberda. Signature does not dispute the applicability of the Construction Industry Fair Play Act, codified in Article 25-B of the Labor Law (§ 861 et seq., effective October 26, 2010), which "contains a

statutory presumption that a person performing services for a construction contractor shall be classified as an employee unless it is demonstrated that such person is an independent contractor in accordance with the three criteria of the ABC test set forth in Labor Law § 861-c (1) or a separate business

entity ... by satisfying all 12 criteria set forth in Labor Law § 861-c (2)."

Matter of Truax & Hovey, Ltd., 205 AD3d 1243, 1244 (3d Dept 2022). See Matter of Fleetwood Drywall Inc., 201 AD3d 1059 (3d Dept 2022); and Matter of Barrier Window Systems Inc., 149 AD3d 1373 (3d Dept 2017); see also, Labor Law §

511(1)(b)(1-b).

The ABC test provides that an individual construction trade worker will not be presumed an employee if all three (3) criteria are met:

(a) the individual is free from control and direction in performing the job, both under his or her contract and in fact;

(b) the service must be performed outside the usual course of business for which the service is performed; and

(c) the individual is customarily engaged in an independently established trade, occupation, profession, or business that is similar to the service at issue.

Labor Law § 861-c (1).

The second test (referred to as the "separate business entity" test) provides that the presumption of employment is overcome if the individual construction trade worker is deemed a separate business entity from the contractor if all

twelve (12) criteria are met:

- (a) the business entity is performing the service free from the direction or control over the means and manner of providing the service, subject only to the right of the contractor for whom the service is provided to specify the desired result;
- (b) the business entity is not subject to cancellation or destruction upon severance of the relationship with the contractor;
- (c) the business entity has a substantial investment of capital in the business entity beyond ordinary tools and equipment and a personal vehicle;
- (d) the business entity owns the capital goods and gains the profits and bears the losses of the business entity;
- (e) the business entity makes its services available to the general public or the business community on a continuing basis;
- (f) the business entity includes services rendered on a Federal Income Tax Schedule as an independent business or profession;
- (g) the business entity performs services for the contractor under the business entity's name;
- (h) when the services being provided require a license or permit, the business entity obtains and pays for the license or permit in the business entity's name;
- (i) the business entity furnishes the tools and equipment necessary to provide the service;
- (j) if necessary, the business entity hires its own employees without contractor approval, pays the employees without reimbursement from the contractor and reports the employees' income to the Internal Revenue Service;
- (k) the contractor does not represent the business entity as an employee of the contractor to its customers; and
- (l) the business entity has the right to perform similar services for others

on whatever basis and whenever it chooses.

Labor Law § 861-c (2).

Initially, we note that a purported employer-contractor can be a sole proprietor or a corporation. Labor Law § 861-b(2). However, the law requires

that the contractor's purported employee must be an "individual", not an entity. Labor Law § 861-c (1) and (2). Stated differently, the statute is

inapplicable to hold a corporation to be an employee of another. We note that such analysis is consistent with the Department's earlier actions to exclude other corporations before issuing the ultimate revised initial determination. To that end, Safe Painting Company Corp. and Michael Angela, Ltd., both registered corporations, cannot be deemed statutory employees of Signature. Also, there is no basis, in fact or law, to include these entities merely because they were not registered with the Unemployment Insurance Division. On the other hand, if individual contractors were actively registered with unemployment insurance, then such individuals could be excluded from an audit assessment, which the Department properly did in this audit (see also, Appeal Board No. 585540). Therefore, Safe Painting Company Corp. and Michael Angela, Ltd. should be excluded from the audit assessment.

Regarding Igor Levechuk, DBA Igor's Painting and Carpentry, the undisputed evidence establishes that he operated a painting business and performed work for Signature, as an individual subcontractor through December 5, 2013. Although the record might satisfy the first and third prongs of the ABC test, the evidence fails to meet the second prong, namely, that Mr. Levechuk's service must be performed outside the usual course of Signature's business. We are unpersuaded by Signature's contention that subcontracted trade work outside of that typically performed by its workers (carpentry, tiling, and framing) should be deemed outside the usual course of Signature's business. Significantly, we hold that Signature is in the business of a general contractor for its clients to renovate their homes, including "bathrooms, kitchens, floors, windows," etc. Notably, Signature characterized itself as a general contractor by stating that its goal is to "renovate the entire apartment". Furthermore, by branding itself out to the public as a general contractor, its clients should understand and contemplate that Signature's business will provide all requisite trade services necessary to complete the renovations. Accordingly, Signature made all trade work an integral part of

its general contracting business (see Appeal Board No. 585540).

The foregoing analysis is similarly applicable to the individual Gennadiy Kaliberda. Again, although the record might satisfy the first and third prongs of the ABC test, the evidence fails to meet the second prong, namely, that Mr. Kaliberda's service must be performed outside the usual course of Signature's business. Not only are subcontractors performing other trade work that Signature does not handle deemed to be inside the usual course of Signature's business, but Mr. Kaliberda was engaged to help cover overflow tile work that Signature concedes its workers performed. Similarly, the contractors in Truax & Hovey, Ltd., *ibid*, and Fleetwood Drywall Inc., *ibid*, were in the business of drywall installation and finishing services, and that the subcontractors' performance of identical work was not outside the usual course of those contractors' businesses.

Under these circumstances, we conclude that all individual subcontractors who performed services for Signature are deemed inside the usual course of Signature's general contracting business. Accordingly, regarding individuals Igor Levechuk and Gennadiy Kaliberda, Signature has not met the second prong of the ABC test that the service must be performed outside of Signature's usual course of business under Labor Law § 861-c (1) (b). Therefore, we must

address the 12-point separate business entity test under Labor Law § 861-c (2)

for these two individuals.

Under the second test, Signature failed to meet, in part, subsections (c) and (f) of Labor Law § 861-c. Without written evidence, Signature merely contends

that both individuals had a "substantial investment of capital in the business entity beyond ordinary tools and equipment and a personal vehicle" (Labor Law § 861-c [2] [c]). Also, without access to their tax returns, Signature

concedes that it has no knowledge if each filed Federal Income taxes as an independent business or profession. Although Signature argues that such statutory demands are unjust and unreasonable, such petition is more appropriate before the legislature. Accordingly, Signature has not overcome the separate business entity test for both Igor Levechuk and Gennadiy Kaliberda. Therefore, as Signature failed to demonstrate that either individual is an independent contractor pursuant to the ABC test set forth in

Labor Law § 861-c (1) or that either is a separate business entity set forth

in Labor Law § 861-c (2), Signature has failed to overcome the presumption of

employee status. Thus, Igor Levechuk and Gennadiy Kaliberda were properly held as statutory employees and their remuneration should be included in the audit assessment. However, based on the conversion of Igor Levechuk's business to a corporation (IL&SON CORP.) on December 6, 2013, he should be removed from the audit assessment effective that date.

Regarding the cash withdrawals, the Department applied one hundred percent of the cash, without allowance for excess, which ultimately resulted in the final estimate of 26 misclassified workers. Significantly, the Department received an off-the-book complaint and Signature provided minimal records regarding the excessive and frequent cash withdrawals. Also, although on notice from the prior audit that its poor record keeping regarding cash resulted in the Department's estimate of unidentified workers, Signature failed to keep and provide records for the instant audit period. Accordingly, the Department's application of such unverified cash towards unreported (under the table) workers is reasonable and not inconsistent with the Department's past practices.

We disagree with the contention that the Department has the burden to support the contention that the cash withdrawals were paid to off-the-books employees. Although Signature's member testified that he took much of the cash withdrawals as his compensation, or paid vendors in cash to obtain a cash discount, no requisite supporting documentation was produced.

We hold differently regarding the \$40,008 fraudulent withdrawal, which amount was unusually high as compared to other cash withdrawals over the audit period, and which was supported by an identified criminal. Accordingly, this amount should not be considered as remuneration and should be excluded from the audit.

Finally, regarding the fraud penalty, the evidence further establishes that the Commissioner's determination was permissible. Pursuant to Labor Law §

570(4), an employer is subject to a fifty-percent penalty of the total amount of the deficient contributions due if any part of such deficiency is due to fraud with intent to avoid payments of contributions. We find Signature's

contention inadequate, namely, that it had its subcontractors execute independent contractor agreements, and that it included some of the individuals held as employees in the prior audit as employees in the current audit period. Significantly, Signature produced inadequate records surrounding the abundant cash withdrawals. Not only does Labor Law § 575 mandate that

Signature must maintain records, but Signature admittedly knew it should from the prior audit. Also, Signature admittedly paid at least one individual off-the-books without keeping records. Accordingly, the Board concludes that at least some of the instant deficiency is due to fraud with intent to avoid payments of tax contributions to the Department of Labor. See *Matter of Body Electric Corp. of America*, 89 AD3d 1331 (3d Dept 2011); and *Matter of Mamash Rest. Corp.*, 270 AD2d 723 (3d Dept 2000).

DECISION: The decision of the Administrative Law Judge, insofar as appealed, is modified accordingly, and as so modified, is affirmed.

The initial determinations, holding Signature Audio Design, LLC, DBA Signature Design & Construction, liable for additional tax contributions in the revised amount of \$86,660.40 for the audit period 1st quarter 2012 through 1st quarter 2014 based, in part, on remuneration paid to misclassified independent contractors, both identified and unidentified, as statutory construction trade employees pursuant to the Construction Industry Fair Play Act, Labor Law article 25-B (§ 861 et seq.), plus a 50% fraud penalty in the amount of

\$43,330.20, is modified to exclude from the audit those amounts related to (1) Safe Painting Company Corp., (2) Michael Angela, Ltd., and (3) \$40,008 fraudulent withdrawal, and as so modified, are sustained.

The employer is liable, in part, with respect to the issues decided herein.

The amounts of tax contributions and fraud penalty are referred to the Commissioner of Labor for recalculation and redetermination not inconsistent with this decision.

MARILYN P. O'MARA, MEMBER